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ABSTRACT

Supreme Court decisions tend to take the form of either (1) an act of justification or argumentation that defends the verdict of the communicator, or (2) a construction of a new symbolic reality that influences the world view of its audience. The "Roe vs. Wade" decision is an example of the merger of these two rhetorical functions. The court needed to defend its decision to abolish state anti-abortion laws and at the same time create a persuasive case for the new perception of acceptable conduct of abortion according to the trimester distinctions. The subsequent judgment on "Roe vs. Wade" was a compromise that elevated the importance of medical judgment, and the creation of a new standard with which the public could identify was weakened by this compromise. Predominate values behind the decision seemed to be legal tradition and the authority of the medical community. However, the one court declaration based on pathos and articulated in active, unequivocal language was the woman's right to privacy which created a new symbol or standard. The rhetorical nature of the court's decision justified the ruling, but it created new points of controversy for public debate. (SRT)

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A PRIVATE ISSUE BECOMES A PUBLIC ISSUE: A RHETORICAL ANALYSIS OF ROE V WADE

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presented at
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A PRIVATE ISSUE BECOMES A PUBLIC ISSUE: A RHETORICAL ANALYSIS OF ROE V. WADE

The Supreme Court's 1973 decisions of Roe v. Wade and Doe v. Bolton[1] struck down as unconstitutional the Texas and Georgia abortion laws. A recent study of the political reaction engendered by these decisions notes that "though Roe was a decisive victory for the pro-abortion forces, it was only the first battle in what was to become a fierce struggle over fundamental principle."[2] Similarly, an historical study of the abortion issue prior to, and after, Roe concluded:

> Abortion has not gone away. Today it divides the country. Neutrality for a legislator is impossible. Each side believes with deep conviction that it is right. But both sides cannot be right and conflict in theory means conflict in practice. Legalized as a private act, abortion has become a public issue. It has become the kind of public issue that compels almost everyone to take a stand.[3]

The irony that a decision to make abortion a private issue sparked a reaction that made abortion a public issue invites an investigation of the societal role of Supreme Court decision-making in this case.

Supreme Court decisions have been identified by rhetoricians as artifacts of rhetorical events.[4] Most frequently, rhetoricians have described Court decisions as an "act of justification,"[5] or a "type of argumentation" that "defends the verdict of the communicator."[6] As an act of justification that occurs within the legal field of argument, rhetorical critics typically have been concerned with the reasonableness of Court decisions.[7] In their study of the rhetorical nature of judicial reasoning from the Court's interpretation of the facts to its justification of the decision, Golden and Makau explain that the composite audience expects opinions to be "predictable, internally consistent, and, above all, reasonable."[8]

There is evidence, however, that the Court's rhetoric in decisions goes beyond justification to include construction of a new symbolic reality that

influences the world view of its audience. Archibald Cox, for example, claims that the Court is the "voice of the national conscience," the institution that expresses and also shapes our national ideals.[9] In reference to this idea of shaping national ideals, Leonard Levy explains that "Americans have become accustomed to look to the Court for symbols and emblems, standards and ideals, lines below which communal action ought not to sink, goals toward which communal action ought to strive."[10] Similarly, Golden and Makau note that "successful judicial argument creates new audience perception and shapes audience opinions;" it provides "new ideas and new perceptual frameworks."[11]

The creation of new symbols, and thereby new perceptual frameworks by the Court suggests that the rhetorical function of Court decisions is broader than that of providing a reasonable defense for its ruling. Edelman has pointed out that "one of the demonstrable functions of symbolization [is] that it induces a feeling of well-being: the resolution of tension."[12] Certainly Burke's idea that rhetoric functions so as to create "consubstantiality," "identification that is compensatory to division,"[13] is an appropriate description of the re-presentation of symbols and communal standards engendered by a Court decision. This second function of Supreme Court decisions, namely constructing a symbolic statement that promotes new identifications and reduces tensions, has been explored less frequently by rhetorical critics.[14]

The Roe decision is an example of the merger of these two rhetorical functions of a Supreme Court decision. On the one hand, the Court needed to defend its decision to strike down anti-abortion statutes by the states. On the other hand, the Court needed to create a persuasive case for the new perception of acceptable conduct of abortion according to the trimester distinctions. The right to "privacy" for pregnant women, the "viability" of

fetuses, and "state interests" in protecting the health of the citizenry are illustrative of concepts for which the Court needed to provide symbols and emblems that would promote identification. This essay investigates both rhetorical functions of the Roe decision in an attempt to explain how the decision to make abortion a private issue encouraged discussion of abortion as a public issue.

The analysis of the text of the decision in the following sections of this essay incorporates a variety of rhetorical-critical methods, many of which will be recognized as Aristotelian and Burkean. The analysis moves from a macroscopic description of the nature of the judgment rendered to progressively more microscopic descriptions of the issues as delineated by the Court, the reasons offered, and the texture and structure of the decision. The concluding section provides a discussion of the interaction between the Court's act of justification and its act of identification in the Roe decision, thereby explaining how it engendered public controversy. I will argue that the decision's effectiveness in justification versus its ineffectiveness in promoting identification accounts for the intense controversy it generated and, therefore, suggest an often unrecognized rhetorical function of Supreme Court decisions -- the punctuation of a public issue. In other words, by adjudicating the arguments of the Roe case, the Supreme Court sets the ground for new debate and controversy on the abortion issue.

A Judgment Rendered

The frame for the Roe decision is set on the first page of the Court opinion. Blackmun wrote: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection" [p. 116]. After reviewing the history of the case and resolving the issue of standing, he continued: "The principal thrust of appellant's attack on the Texas

statutes is that they improperly invade a right, . . ." [p. 129] These statements imply an adjudicative act of measuring the particular statute against the Constitution with the result of ruling that the statute either is or is not constitutional.

However, the final decision by the Court, as found in Sections X and XI of the majority opinion, appears to be more a matter of compromise than an answer to an either/or question. Blackmun wrote:

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still <u>another</u> important interest in protecting the potentiality of human life. These interests are separate and distinct. [p. 162]

In Section XI, the Court specifies the periods during pregnancy when each interest comes into play. In essence, the Court divides the gestation period into three parts, each part corresponding to a different interest. Rather than resolving the issue wholly in terms of the pregnant woman or wholly in terms of the State, the Court appears to differentiate[15] each interest such that each has priority at some time during the pregnancy. Immediately following the decision in Section XI, however, the Court explained: "This holding we feel, is consistent with the relative weights of the respective interests involved . . ." [p. 165] The effect of the Court's differentiation is to re-cast the decision in the frame of a compromise, for which the Court weighed interests and developed a solution equitable to those interests. By rendering a judgment of compromise, rather than declaring such statutes either clearly "constitutional" or clearly "unconstitutional," the Court implies that the matter may be open for renegotiation at a future date.

Furthermore, the final decision seems to necessitate future judgments by parties outside the judicial system. In the specification of their decision

in Section XI, the Court writes:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother. [pp. 164-5]

The Court's specification of trimester rights suggests that final judgment will rest primarily in the hands of physicians and secondarily in the hands of the State. The Court's comments about the holding support this interpretation.

> The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens. . . .The decision vindicates the right of the physician to administer treatment according to his professional judgment . . . the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with [the] physician [pp. 165-6]

The Court's placement of the final judgment in the hands of physicians is particularly curious because earlier in the opinion, the Court denied standing to the appellant's doctor. More important, however, is the Court's apparent tendency to explain how the rights divide during the gestation period and then to transfer future judgments to physicians and states. In short, the Court seems to redefine the abortion decision as one which rests in the medical community, rather than either the judicial community or the private sphere of the pregnant woman.

If one considers the concurring and dissenting opinions in addition to the majority opinion, the compromise nature of the judgment becomes even clearer. Before the decision was released, several of the justices and many of the clerks found fault with it.[16] Even though Justice Blackmun adapted the

majority opinion to include mention of a variety of issues which concerned his colleagues, three of those in the majority found it necessary to write concurring opinions and two of the justices dissented.

The multiplicity of opinions may detract from the persuasive force of the majority opinion, but more importantly, the other opinions reinforce the compromise nature of the judgment. The dissenting opinions suggest that the judgment reached by the majority is a holding that abortion is available on demand. Justice White, for example, wrote: "During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life of the fetus." [p. 221] In contrast, Justice Burger, in his concurring opinion, wrote: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand." [p. 208]

The judgment rendered is one of compromise, but a compromise that eventually elevates the importance of medical judgment, rather than either the judgment of the State or the pregnant woman. Although the Court's judgment may not detract from their justification of the decision, the nature of the judgment may detract from the Court's ability to set new standard by creating a sense of identification. Both the shift in frame from one of resolution by adjudicative measurement to compromise and the multiplicity of diverse opinions regarding the Court's decision are likely to provoke divisiveness rather than identification.

Delineation of the Issues

The Court opinion discussed seven major issues: standing for the various appellants, the historical attitude toward abortion, the proper role of the state in acting to circumscribe abortions, the medical safety of abortions, the protection of prenatal life, the right of privacy, and the nature of the

fetus as either a person or a non-person. The Court's development and resolution of these issues can be classified according to the Classical system of stock issues for forensic oratory. Hence, I will refer to the issues as factual, definitional, qualitative, or procedural[17] during my discussion of which issues are resolved and which are not.

After reviewing the history of the case and the Texas statute under question, the Court discussed the issue of standing. The Court decided that Mary Roe did have standing even though she was not pregnant at the time her case reached the appellate court. This decision rested on a qualitative issue, as the Court recognized that the gestation period was short enough that the usual appellate process would be incomplete by the time gestation was complete.

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. . . . Our law should not be that rigid. [p. 125]

The doctor in this case was denied standing according to a procedural issue. Because the doctor was charged with violating the abortion law, he needed to have made his case at the state level before the Supreme Court would rule in his regard.

> Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. [p. 126]

The Does, appellants in the companion case to Roe, were not granted standing because they had suffered no injury. They only speculated that Mrs. Doe might get pregnant, and if she did so, might not be prepared for the pregnancy and might not be able to obtain an abortion. Citing precedent that indicated such speculation was insufficient for obtaining standing, the Court

rejected the Does' standing on definitional grounds.

> But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. [p. 128]

Following the standing issue, the Court embarked on a lengthy discussion of the history of abortion, "for such insight as the history may afford us." [p. 129] Ancient attitudes, the relevance of the Hippocratic Oath, English statutory law, American common law, the positions of the American Medical Association, the American Public Health Association, and the American Bar Association were all reviewed. Throughout the review, the Court noted that abortion was viewed as an acceptable practice.

> Ancient religion did not bar abortion. [p. 130]
> [The Hippocratic Oath] is 'a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.' [p. 130]
> it now appear[s] doubtful that abortion was ever firmly established as a common-law crime . . . [p. 136]
> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout a major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect. [p. 140]

The historical attitude toward abortion seems to represent a qualitative or procedural issue. In other words, if everyone has approached abortion favorably, then perhaps the Court should do the same. Much later in the opinion, this issue was reintroduced when the Court described their holding as consistent "with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." [p. 165]

After chronicling the historical attitude toward abortion, the court refuted three reasons for anti-abortion statutes. First the Court suggests that if these laws are designed "to discourage illicit sexual conduct, this is not a proper state purpose at all." [p. 148] Concern with proper state action indicates a procedural issue. Secondly, the Court reviewed "medical data indicating that abortion in early pregnancy . . . is relatively safe," [p.

149] thus suggesting that the state was not really protecting the health of the woman. The argument is developed with a factual issue -- the state of medical safety regarding abortion. Thirdly, the Court dealt with the issue of protecting prenatal life. The Court reviewed this issue definitionally by suggesting that "as long as potential life is involved the state may assert interests," [p. 150] and by investigating the legislative history of the statutes to see if they are based on "potential life." They concluded that the statutes were not based on protection of potential life. [pp. 151-2]

Section XIII of the decision dealt with the right of privacy. Here the Court wrote: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [p. 153] The reason given for this broad right of privacy, however, did not stem from the Court's review of cases dealing with the right of privacy (a definitional consideration), but from the Court's review of the detrimental effects on the woman of invading that right (a qualitative issue). [p. 153] The issue was not resolved, however, as the Court continued by suggesting: "The privacy right involved, therefore, cannot be said to be absolute." [p. 154] This distinction appears to stem from a qualitative discussion of the state's interest in safeguarding health. The balancing of rights, or qualitative distinctions regarding the individual and the state, was supported with references to numerous lower court decisions which brought the Court back to an issue of definition. The cumulative effect of switching back and forth between quality and definition was to leave the issue hanging. Although there was precedent for the right of privacy and for considering the detrimental effects on the woman of invading her privacy, there was also precedent for a state's invasion of that right on the grounds of protecting health. The Court did not rule in favor of either of these competing sets of precedent, but left

this question a matter for negotiation.

The next issue discussed by the Court was the nature of the fetus. Was the fetus a person and therefore subject to protection by the state? It will be recalled that the Court had defined the fetus earlier in the decision as potential life subject to protection. In Section IX, however, the opinion examined the contextual meaning of a person in the Constitution (a definitional consideration) and concluded that "the word 'person' as used in the Fourteenth Amendment, did not include the unborn." [p. 158] The Court continued its definitional development of this issue by noting previous court decisions that verified the above definition of non-personhood. Two paragraphs later, the potential life distinction was revived and the Court finally concluded: "We need not resolve the difficult question of when life begins." [p. 159] This issue surfaced again in the last statement in Section IX: "In short, the unborn have never been recognized in the laws as persons in the whole sense." [p. 162] Because this statement followed a lengthy discussion of legal definition and application of previous laws, it seems that the Court had returned to a definitional treatment of the issue. However, the final judgment that leaves the question of when life begins to the medical community makes clear the Court's implicit use of procedural grounds not to decide the issue, rather than using the definitional elaboration provided in Section IX.

At the conclusion of the opinion, the issues emerge in the following manner. Factually, abortions are safe early in pregnancy. By definition, a woman has a right to terminate her pregnancy and the state has a right to intervene to protect the health of its citizenry. By definition, the fetus is not a person and cannot be afforded protection by the state, but the fetus does have potential for life and therefore can be afforded protection by the state. Qualitative considerations reinforce the woman's right to terminate her pregnancy and encourage the Court to reconcile its decision with the

historical context that proved to be more lenient towards abortion than the statutes under review. Procedurally, the Court should not decide when life begins, but should make a decision consistent with historical and contemporary attitudes toward abortion. Those issues developed via definition are often left unresolved, while those issues treated qualitatively and procedurally often are resolved. The Court's characterization of their holding as "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of common law, and with the demands of the profound problems of the present day," [p. 165] testifies to the resolution of issues just described.

The lack of resolution of definitional issues serves as the key for Rehnquist's dissent, which concentrated on the definitional issues of Roe's standing, privacy, and compelling state interests. [pp. 171-8] Similarly, White's and Rehnquist's dissenting opinions attacked the procedural issue of the proper role of the Court. Even the concurring opinions undermine the resolution of issues as Stewart introduced new definitional argument to explain the Constitutional foundation for the right of privacy [pp. 168-70], and Douglas introduced additional argument by definition to suggest that the right to privacy outweighs competing interests. [pp. 209-20] The concurring and dissenting opinions, then, further exacerbate the lack of resolution of definitional issues. The only issue that seems to remain certain and resolved is that historically abortion has not been held in an unfavorable position by a number of institutions.

Reasons Provided by the Court

Whereas the previous section was devoted to an examination of the larger issues, or divisions of justification, this section is devoted to individual arguments: their types, their underlying values, and their evidence.

In Aristotelian terms, the reasons given by the majority opinion are primarily arguments that use logos. For example, when discussing the relevance of the Hippocratic Oath, Blackmun writes:

> Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. . . . For Pythagoreans, however, it was a matter of dogma. . . . Thus, suggests Dr. Edelstein, it is a 'Pythagorean manifesto and not the expression of an absolute standard of medical conduct.' [pp. 131-2]

Thus the Court used data that suggested an inconsistency between the Oath and actual practice at the time of the Oath in order to conclude that the Oath is not particularly relevant.

Similarly, when the Court refuted reasons for anti-abortion laws, Blackmun wrote;

> A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. . . . Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without risk, is now relatively safe. . . . Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. [pp. 148-9]

The Court supported their claim that the State's interest is no longer valid as a result of advances in medical technology.

In regard to the privacy issue, the Court cited fifteen precedents that outlined the right to privacy under a variety of conditions [p. 152] and then concluded that the right to privacy was broad enough to cover a woman's decision to abort. The argument followed an inductive pattern based on legal evidence.

There seems to be only one deviation from the overwhelming reliance on

logos. Regarding the privacy issue, the Court used an appeal based on pathos. The Court claimed that: "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." [p. 153] The statements used to support this claim were unsupported by explicit data but aimed directly at human compassion.

> . . . direct harm medically diagnosable even in early pregnancy may be involved . . . may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed . . . distress for all concerned . . . continuing stigma of unwed motherhood may be involved. [p. 153]

Every other argument provided in the decision seems based on evidence devoid of emotional content and heavily weighted toward rational thought.

A reliance on ethos is similarly neglected in favor of more rational arguments. Although the Court frequently cited judicial authority, it rarely puts itself (this Supreme Court) in a position of authority. References to the Court itself are described in the following section of this essay; for now it should be noted that the Court most frequently cited other authorities for its arguments and rarely said: "We find that abortion is x or y." Certainly the credibility of the Court as an institution endows this decision with some power,[18] but the Court does not use this credibility within its argumentation. Likewise, the Court's reliance on other authorities may contribute to the Court's ethos, but the persuasive force of the arguments is not derived explicitly from the Court itself.

As I have mentioned in the preceding paragraphs, the Court incorporates a considerable quantity of data into its arguments. There are sixty-six footnotes to this decision. Sixty-two of these refer to sources of evidence or provide additional data for the arguments. Most include multiple references. In the section dealing with the historical attitude toward abortion, the Court draws data from a variety of sources: thirteen historians

and doctors; three legal historians including Coke, Blackstone, and Means; ancient writers including Plato, Aristotle, Hippocrates, Galen, and St. Augustine; three professional associations including the AMA, the APHA, and the ABA; and documents including the Bible and a Catholic University publication. Ninety-two previous court decisions are cited within the text of the opinion. Others are referred to within the notes. Numerous references are made to evidence presented in the briefs and oral arguments. The data can only be described as overwhelming.

The Court appeared to rely primarily on expert medical opinion and previous legal opinion. As Blackmun wrote in the beginning of the opinion, the Court "inquired into, and in this opinion placed some emphasis upon medical and medical-legal history and what that reveals about man's attitude toward the abortion procedure over the centuries." [p. 117]

Whenever the Court discussed an issue in qualitative terms, it appeared to rely heavily on testimony from the medical community. For instance, two of the three sources of evidence for the contemporary attitude toward abortion were professional medical associations. When the Court reviewed factual material regarding the safety of abortion or the status of the fetus, medical testimony and medical studies were invoked. When the Court discussed definitional issues such as the right to privacy or the legal status of a fetus, legal opinion was used, primarily in the form of previous court decisions. Because the definitional issues remain largely unresolved while the qualitative issues are generally resolved, the expert opinion from the medical community seems to be the Court's most useful type of evidence.

The underlying values suggested by the Court's arguments can be inferred from the type of arguments and the type of data used. The arguments suggest the value of legal tradition and the ultimate authority of the medical

community. The concentration of arguments concerning historical attitude and the use of historical legal and medical opinion promote the value of tradition. The persistent citation of previous cases for their logical connection to the case at hand suggest commitment to legal tradition. The frequent deference to medical authority in resolving factual and qualitative disputes promotes the authority of the medical community. These values may not be surprising at first glance; however, alternatives are available. For example, the Court might have cited sociological and psychological studies regarding the detrimental effects of unwanted pregnancy in the context of an argument concerning the priority of the individual and the detrimental effects of invading the privacy of an individual. Use of such an argument would have suggested a stronger value concerning the primacy of the individual and a lesser value regarding the medical community's understanding of the beginning of "life." Such an argument, however, does not appear in this opinion.

Texture and Structure of the Decision

The stylistic features of the Court's opinion, both organizational structure and language structure, also reveal the rhetorical characteristics of this decision. The style enhances the Court's justification for the decision while undermining its ability to create identification through the creation of strong, new symbols.

The first structural characteristic apparent in the Roe decision is the Court's use of an implicative method. As the previous discussion of the issues and arguments indicated, the opinion replays numerous arguments for the reader before stating the decision. The structure of particular issues follows a similar implicative pattern. The Court generally reviewed several arguments and then stated its conclusion about the issue. The structure of individual arguments follows the same pattern. The Court invariably reviewed

the data and subsequently stated the conclusion to which that data led. The effect of this implicative method is to let the arguments speak for themselves, unfolding the issues, arguments, and data while concealing the conclusion until the end.

It is, perhaps, not surprising that the Court's use of language reinforces the implicative structure just described. The language of this decision suggests that the Court's conclusions are inevitable. In other words, the Court puts itself in a passive role, compelled by the evidence and arguments to conclude in particular ways. After presenting appellee arguments and court precedent regarding Roe's standing, for example, the Court said: "We, therefore, agree with the District Court." [p. 125] Regarding the doctor's standing, the Court wrote: "Our decision in Samuels v. Mackell compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Halford." [p. 126] When denying standing to the Does, Blackmun wrote: "Their complaint was properly dismissed by the District Court, and we affirm that dismissal." [p. 128] When the Court dismissed the relevance of the Hippocratic Oath, it quoted Dr. Edelstein's explanation and then affirmed that explanation. Throughout the remainder of the sixteen page discussion of the historical attitude toward abortion, the opinion never referred to conclusions by the Court. There is no use of "we," "us," or "the Court," even in a passive role. Such language certainly reinforces the idea that for the Court to rule other than it did would have been unreasonable, but at the same time the language undermines the legitimacy of new standards and symbols by divorcing them from the authority of the Court itself.

Following the discussion of historical attitudes, the Court returned to a style that put the Court in a passive role. In the discussion concerning the legal status of the fetus, the Court said: "All this . . . persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the

unborn." [p. 158] In short, the language of this opinion suggests that the Court "was persuaded," "was compelled," or "was led to understand," but did not very frequently "decide" to find a conclusion to the issues. The evidence appears to act upon the Court, rather than the Court acting upon the evidence.

The refutation of arguments in favor of State regulation of abortion also divorces the Court from an active role. Here the Court did not even suggest that it was persuaded or compelled, but ignored its role in the process completely. The language shifted to third person, and the credit or responsibility for refutation was placed in the hands of parties outside the Court. The State's purpose of controlling illicit sexual conduct was refuted by "appellants and amici." [p. 148] Similarly, "appellants and various amici" [p. 149] provided the argument that abortions are now relatively safe, and , hence, the state has little legitimate interest in protecting the health of the mother. When the Court refuted the notion that State anti-abortion laws protect the unborn, they based their refutation on legislative history. The history, however, was discovered by parties other than the Court: "There is some scholarly support for this view of original purpose . . . Proponents of this view point out . . . They claim . . ." [p. 151] Here too the role of the Court is a passive one; the evidence speaks for itself, without assistance by the Court.

The only exception to the use of language just described occurs during the Court's discussion of the privacy issue. After concluding that the right to privacy is relevant in this case, without referring to "we" or "the Court," the opinion reviewed the issue of whether or not this right is absolute. Initially, the Court followed the familiar language pattern in which they stated what "appellant and amici argue" and explained that "with this we do not agree." [p. 153] At this point, however, the language shifted, and sud-

denly the Court put itself in an active role.

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . .
> The Court has refused to recognize an unlimited right of this kind in the past. We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified. . . .
> We note that recently considered abortion law challenges have reached the same conclusion. We agree with this approach. [pp. 154-5]

The passages just cited are the only cluster of statements in the forty-two page opinion that place the Court consistently in an active role. The issue to which the active language was attached was not completely resolved, but, as I will discuss in the following section, was an issue that was pivotal in shaping new audience perceptions. In contrast to this cluster, the majority of the opinion placed the Court in a more passive role.

A third characteristic that emerges is the indecisiveness indicated by the language use. The opinion contains many qualifiers. The Court rarely said "we find" or "we conclude" or "it is;" instead the Court often explained that "we feel" [pp. 129.153,165], "it perhaps is" [p. 129], "it seems to us" [p. 132], "it now appears" [p. 136], and "we have intimated" [p. 159]. The use of these tentative terms is particularly striking if one compares the language of the majority opinion with that of Justice Douglas' concurring opinion. In Douglas' opinion, words like "obviously," "absolute," "must," "of course," "without doubt," "the clear message," "no doubt" [pp. 209-20] are used frequently. These words are not used in the majority opinion.

Not only is the Court's use of language tentative, or qualified, but the language also indicates the existence of controversy. There are frequent references to arguments and attacks advanced by appellees and appellants. There are frequent references to conflicting court decisions. Such references set a tone of controversy. This is not particularly surprising when one

considers that the process that brought the case to the Supreme Court was a process of controversy. However, because the Court is not only rendering a judgment regarding the prior controversy but also providing new symbols for the body politic, the Court's use of the language of controversy rather than the language of decisiveness encourages multiple perspectives and divisiveness rather than identificaation.

A final comment regarding the texture and structure of the opinion is necessary. The language and structure of this opinion appears sterile. Blackmun's initial suggestion that the Court would decide "free of emotion and of predilection" [p. 116] is an accurate description of the language of the majority opinion. Volumes of information and factual data were presented with relatively little emotional baggage. The evidence was presented in an objective manner with tentative conclusions following. The language is free from metaphors, euphemisms, or explicit bias. Such a sterile presentation of the arguments may promote the Court's image of objectivity and the rationality of its justification, but certainly sacrifices the power of definition as a tool with which to promote identification.

Conclusion

In the years since 1973, the Roe decision has been the object of both praise and criticism, the basis for numerous subsequent judicial rulings, and the impetus for much proposed legislation and Constitutional amendment regarding both the act of abortion and the role of the Court itself. As John Ely, professor of law at Yale, predicted in 1973: "Roe v. Wade seems like a durable decision," that will not "perceptibly weaken the Court," and is consistent with society's idea of progress.[19] Its continued use as precedent for subsequent cases both on the issue of abortion and on the issue of the right to privacy is testimony to its effectiveness as a rhetorical act of

justification.

The effectiveness of Roe as an act of justification can be explained by a review of its rhetorical characteristics. In almost all aspects, the decision is consistent with the composite audience's expectations for a predictable, internally consistent, and reasonable decision. The issues are discussed in relatively sterile language that manifests little bias. The arguments developed and provided in support of the decision are both well documented with data, particularly legal precedent, medical testimony and historical record and aim toward the audience's rationality and reasonableness. The arguments and issues unfold implicatively for the audience in such a way as to explain why some issues can be decided and others cannot. The nature of the judgment itself, as a compromise, may be appealing to the audience who struggles with the complexities of each issue and the conflicts between legal precedents.

In terms provided by Branham and Pearce, the Roe decision as a "text" exhibits a relationship with its "context," the composite audience's expectations, that can be defined as a "charmed loop."[20] In other words, the opinion conforms to the overriding expectation for reasonableness and explicitly attempts to maintain consistency with historical and contemporary values. However, if we consider the second rhetorical function of the decision, identification that creates new symbols through which tensions can be reduced, the "text" seems to exhibit a relationship with the "context" better described as a "subversive loop." In other words, the decision both creates and fails to create new symbols such that the context is altered, provoking new divisions and new controversies. Again a review of the rhetorical dimensions of the decision sharpens the point.

First, although the value of legal tradition is reinforced by the Court's use of data in this decision, the ethos of the Court itself is rarely invoked

as a means of justification. Both the pattern of argument and the language of the arguments portray a passive role for the Court. Combined with the multiplicity of concurring and dissenting opinions, the view of the Court that emerges is one of a reluctant and hesitant decider. This role may encourage continued controversy by suggesting that even the Court is not sure of itself on this matter. Hence, anti-abortion factions may be encouraged to seek a renegotiation of competing interests. The current fear of pro-abortion groups and optimism of anti-abortion groups that a change in the composition of the Court could result in a reversal of the decision is indicative of the perception that the decision was not solely a result of the Court, or legal tradition, but the result of the coalescence of views by particular members of the Court.[21] Given the low level of responsibility by the Court for the decision in terms of its arguments and language-use, a reversal might be easier to obtain in that the ethos of the Court would not be at stake.

Secondly, the decision lays the ground for continued, if not new, controversy about the definition of "life." Although the Court found that a fetus was not a person, it recognized that the fetus might have the potential for life. By explicitly deciding that it could not determine when life begins, the Court created a vacuum in which public controversy could foment. The trimester separation of rights depends on a concept of "viability" that demands an answer regarding when life begins, an answer the Court leaves for the medical community. The Court's heavy reliance on medical opinion in this case points toward the institution that will most likely finally decide when abortion is appropriate and when it is inappropriate.[22] Given the trend of medical technology to continuously search for ways of preserving, extending, and activating life, a stable answer to when life begins is likely to remain elusive. Consequently, controversy regarding this issue will likely continue.

Importantly, the nature of the Court's judgment does not allow the controversy regarding viability to be separated from the legality of abortion. By basing the legal status of abortion on the technological status of medicine, the Court thrusts a private decision into the public arena.

The Court's elevation of the medical community's opinion for the decision about when life begins may account for the particularly vitriolic response to the decision by many religious groups,[23] who consider the meaning of "life" to be a religious rather than a medical question. Similarly, by tieing the decision on abortion to the advice of doctors the Court contributes to the dissatisfaction of many pro-abortionists who would have preferred that the choice regarding abortion reside with the pregnant woman.[24] At least some legal experts have exhibited similar frustrations. Ely, who praised the decision as durable and favors striking down the anti-abortion statutes, accuses the Court of saying "nothing, clear or fuzzy, about abortion."[25] His objection is an objection not to the justification, but to the symbolic void created by the decision. In short, the decision punctuates the issue by setting new grounds for controversy about which group should properly decide when life begins.

The Court's declaration of the woman's right to privacy is probably the clearest, if not the only, creation of a new symbol or standard by the Court. This declaration exhibited the only argument based on <u>pathos</u> and the only cluster of active, unequivocal language in the decision. However, the relative brevity of this declaration as compared to the rest of the opinion, and the non-resolution of the privacy issue because of conflicting precedent and the indecision about when life begins undermines the persuasive value of this symbol as a means of identification. Hence, the grounds for subsequent debate cannot rely solely in the context of the privacy issue but must turn to the context of the "life" issue as well. "As the Court extended the themes of

privacy and personal autonomy to the conclusion reached in Roe, it simultaneously ignited a debate over the meaning of 'life.'"[26] Because of the compromise, the right to privacy was not made paramount, and thus, the Court's potential point for creating identification was undermined by its lack of resolution on the "life" question. In rhetorical terms, the Court created a point for future divisions, rather than for identification.

Legal scholars have noted that "Supreme Court pronouncements in many instances are both the culmination of one debate and the beginning of a new one."[27] Similarly, political scientists have suggested that once a public issue enters an institutional forum the nature of the issue changes.[28] Rhetorically, an issue so changed provides new grounds for either identification or division. The Roe decision furnishes an excellent example of the punctuation of discussion of public issues by the Court. The rhetorical dimensions of the text explain how this decision justified the ruling in terms of audience expectations while at the same time created points for future division and controversy.

Notes

[1]All references to Roe v. Wade in this essay are from "Roe v. Wade," U.S. Reports, vol. 410 (Washington: Government Printing Office, 1973), pp. 113-223. The page numbers for particular references in this essay will be indicated within brackets in the text.

[2]Albert M. Pearson and Paul M. Kurtz, "The Abortion Controversy: A Study in Law and Politics," Harvard Journal of Law and Public Policy, 8 (Spring 1985), 427.

[3]John T. Noonan, Jr., A Private Choice (New York: The Free Press, 1979), p. 1.

[4]See, for example, Richard Crable, "Models of Argumentation and Judicial Judgment," Journal of the American Forensic Association 12 (Winter 1976), 118; see also, Ernest Wrage, "Public Address: A Study in Social and Intellectual History," Quarterly Journal of Speech 23 (Dec. 1947), 452.

[5]James L. Golden and Josina M. Makau, "Perspectives on Judicial Reasoning," in Explorations in Rhetoric, Ray E. McKerrow, ed. (Glenview: Scott, Foresman, 1982), pp. 157-77. The authors identify four steps in the Supreme Court's adjudication process and note that justification permeates each. See also, Josina M. Makau, "The Supreme Court and Reasonableness," Quarterly Journal of Speech 70 (November 1984), 379-96.

[6]Crable, 118.

[7]See, for example, David Rubin, "Gottlieb's Model of Rule-Guided Reasoning: An Analysis of Griswald v. Conn.," Journal of the Americal Forensic Association 15 (Fall 1978), 77-90; see also, Stephen Jones, "Justification in Judicial Opinions: A Case Study," Journal of the American Forensic Association 12 (Winter 1976), 121-29.

[8]Golden and Makau, p. 172.

[9]Archibald Cox, The Warren Court (Cambridge: Harvard University Press, 1968), p. 27.

[10]Leonard Levy, ed., The Supreme Court Under Earl Warren (New York: New York Times Co., 1972), p. 35.

[11]Golden and Makau, p. 173.

[12]Murray Edelman, The Symbolic Uses of Politics (Urbana: U. of Ill. Press, 1974), p. 38.

[13]Kenneth Burke, Rhetoric of Motives (Berkeley: U. of Cal. Press, 1969), p. 44.

[14]Golden and Makau point out the need for majority opinions to "allay the potential disappointment of the litigants, to produce authoritative support for the decision," and so forth on p. 172. An example of a critique of

Supreme Court decisions that examines construction of national symbols may be found in Jeter Louis Campbell, "Justices Douglas and Black and the Democratic Ethos: Rhetorical Criticism of Concurring and Dissenting Opinions on Obscenity 1954-75," Education 40 (Aug. 1979), 538. See also, Nancy Dunbar and Martha Cooper, "A Situational Perspective for the Study of Legal Argument: A Case Study of Brownv. Board of Education," in Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation, eds. George Ziegelmueller and Jack Rhodes (Annandale, Va.: SCA, 1981), pp. 213-40.

[15]This term is used in the manner described by Robert P. Abelson, "Modes of Resolution of Belief Dilemmas," Journal of Conflict Resolution 3 (1959), 343-352. Abelson suggests that when confronted with conflicting beliefs, one way to deal with the conflict is to split the conflicting elements into distinct categories.

[16]For a discussion of the Court's division regarding this case, see Bob Woodward and Scott Armstrong, The Brethren (New York: Simon and Schuster, 1979), pp. 231-6.

[17]For a discussion of the Classical issues and their meaning, see George Kennedy, The Art of Persuasion in Greece (Princeton: Princeton U. Press, 1963), pp. 306-14; see also, Lee Hultzen, "Status in Deliberative Analysis," in The Rhetorical Idiom, Donald C. Bryant, ed. (New York: Russell & Russell, 1966), pp. 98-108. "Factual" refers to a question concerning what the facts are, "definitional" to an attempt to classify a statement or behavior in terms of the law or legal precedent, "qualitative" to a suggestion of extenuating circumstances or other factors that make a classification according to the law unrealistic, and "procedural' to a discussion of the proper function of the court.

[18]Edelman, p. 108, notes the Court's "considerable credibility."

[19]John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," Yale Law Journal 82 (May 1973), 947.

[20]Robert J. Branham and W. Barnett Pearce, "Between Text and Context: Toward a Rhetoric of Contextual Reconstruction," Quarterly Journal of Speech 71 (Feb. 1985), 19-36. The authors describe a "charmed loop" as reinforcing relations between texts and contexts; a "suversive loop" as a breach in the relationship between text and context.

[21]Pearson and Kurtz, 464.

[22]In their review of decisions on abortion statutes since 1973, Pearson and Kurtz note a "constant reliance on the medical model of analysis," see Pearson and Kurtz, 437.

[23]A concise review of the intense reaction to the decision by religious groups may be found in Woodward and Armstrong, pp. 238-9.

[24]For illustrations of such dissatisfaction, see James Mohr, Abortion in America (New York: Oxford U. Press, 1978), p. 249.

[25]Ely, 927.

[26]Pearson and Kurtz, 463.

[27]Pearson and Kurtz, 463.

[28]W. Lance Bennett, Public Opinion in American Politics (New York: Harcourt, 1980), pp. 346-56.